



# Report #73 – Bigamy

(Final Draft)

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This Report contains draft revisions to certain District criminal statutes. These draft revisions are part of the D.C. Criminal Code Reform Commission’s (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

This Report has two main parts: (1) draft statutory text for inclusion in the Revised Criminal Code Act of 2021 (RCCA) the bill submitted to the Council by the CCRC on October 1, 2021; and (2) commentary on the draft statutory text.

The Report’s commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and may address the provision’s relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Appendices to this report are:

- Appendix A – Black Letter Text of Draft Revised Statute. (No commentary.)
- Appendix B – Redlined Text Comparing Draft Revised Statute with Current D.C. Code Statute. (No commentary.)
- Appendix C – Disposition of Comments on Report #73 – Bigamy (First Draft). (No commentary.)

A copy of this document and other work by the CCRC is available on the agency website at [www.ccrdc.gov](http://www.ccrdc.gov).

**Report #73 – Bigamy**  
**Draft RCCA Text and Commentary**  
Corresponding D.C. Code statutes in { }

§ 22A-5602. Bigamy. {D.C. Code § 22-501}

**§ 22A-5602. Bigamy.**

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
  - (1) Marriage license application; or
  - (2) Domestic partnership declaration.
- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more immediately prior to the application or declaration, both:
  - (1) Has had no contact with the spouse or domestic partner; and
  - (2) Is not aware that the spouse or domestic partner is living.
- (c) *Affirmative defense.* It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the spouse or domestic partner is deceased.
- (d) *Penalties.* Bigamy is a Class A misdemeanor.
- (e) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for false statements under § 22A-4207 shall merge when the convictions arise from the same act or course of conduct and the same complainant.
- (f) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-212.

*Explanatory Note.* This section establishes the bigamy offense in the proposed Revised Criminal Code Act (RCCA). Bigamy covers conduct that results in misrepresenting the existence or status of a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration. The revised bigamy offense replaces the bigamy statute<sup>1</sup> in the current D.C. Code.

Subsection (a) specifies the prohibited conduct – misrepresenting the existence or status of a previous marriage or domestic partnership. “Domestic partnership” is a defined term in RCCA § 22A-101 that has the meaning specified in D.C. Code § 32-701(4). Subsection (a) also specifies the culpable mental state for subsection (a) to be “knowingly,” a term defined in RCCA § 22A-206 that here requires the accused be aware to a practical certainty that the actor is misrepresenting the existence or status of a previous marriage or domestic partnership.

Subparagraph (a)(1) and subparagraph (a)(2) state that the misrepresentation must be either on a marriage license application or a domestic partnership declaration. The last words of subsection (a) clarify that the documents must be those produced by the District of Columbia. Per the rules of interpretation in RCCA § 22A-207, the “knowingly” culpable mental state in subsection (a) also applies to the elements in subparagraph (a)(1) and subparagraph (a)(2), here requiring the accused to be aware to a practical certainty that the misrepresentation is on a District of Columbia marriage license application or domestic partnership declaration.

Subsection (b) establishes an exception to liability for bigamy when certain requirements are met. Subsection (b) specifies that these requirements exist “in fact,” a defined term in RCCA § 22A-207 that indicates there is no culpable mental state required for a given element. Per the

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<sup>1</sup> D.C. Code § 22-501.

rules of interpretation in RCCA § 22A-207, “in fact” applies to all circumstances that must be proven the exclusion from liability, namely that for 5 or more years immediately prior to the application or declaration the actor: (1) had no contact with the spouse or domestic partner, and (2) is not aware that the spouse or domestic partner is living. “Domestic partner” is a defined term in RCCA § 22A-101 that has the meaning specified in D.C. Code § 32-701(3). RCCA § 22A-201 specifies the burden of proof and production for all affirmative defenses in the RCCA. Under RCCA § 22A-201, if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt.

Subsection (c) provides an affirmative defense to bigamy if the defendant, in fact, reasonably believes that the spouse or domestic partner is deceased. “In fact” is a defined term in RCCA § 22A-207 that indicates there is no culpable mental state required for a given element. Similarly, any circumstance element or result element that is the object of the phrase “reasonably believes” need not be proven to actually exist. Reasonableness is an objective standard that must take into account certain characteristics of the actor but not others.<sup>2</sup> RCCA § 22A-201 specifies the burden of proof and production for all affirmative defenses in the RCCA. Under RCCA § 22A-201, the actor bears the burden of proving the elements of the defense by a preponderance of the evidence. Even if the defense applies and there is no liability under this section, depending on the facts of the case, a defendant may still be liable for false statements.<sup>3</sup>

Subsection (d) specifies relevant penalties for the offense. [See RCCA §§ 22A-603 and 22A-604 for the imprisonment terms and fines for each penalty class.]

Subsection (e) provides that convictions for bigamy and false statements<sup>4</sup> merge when the convictions arise from the same act or course of conduct and the same complainant.

Subsection (f) specifically requires the sentencing court engaged in the merger procedure under subsection (e) of this section to follow the procedures in subsections (b) and (c) of RCCA § 22A-212.

***Relation to Current District Law.*** *The revised bigamy statute changes current District law in two main ways.*

First, the revised bigamy offense requires a “knowingly” culpable mental state for the elements of the offense. The current D.C. Code bigamy statute does not specify a culpable mental state for the comparable elements.<sup>5</sup> However, District case law from the 1940s, while not specifying what, if any, culpable mental state is required for the offense, rejected the defendant’s claim that he believed he was innocent because such a belief, even if honestly held, was not

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<sup>2</sup> See, e.g., Model Penal Code § 2.02 cmt. at 241-42 (1985) (citations omitted). “...these questions are asked not in terms of what the actor’s perceptions actually were, but in terms of an objective view of the situation as it actually existed. ... The standard for ultimate judgement invites consideration of the ‘care that a reasonable person would observe in the actor’s situation.’ There is an inevitable ambiguity in ‘situation.’ If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”

<sup>3</sup> RCCA § 22A-4207.

<sup>4</sup> *Id.*

<sup>5</sup> D.C. Code § 22-501 (“Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy”).

reasonable.<sup>6</sup> In contrast, the revised statute requires a person knowingly “misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration.” The requirement of a knowing mental state means that an honest but unreasonable mistake as to marital status would make the conduct innocent.<sup>7</sup> Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>8</sup> A knowingly culpable mental state also makes the revised bigamy offense consistent with many other statutes in the RCCA, which generally require that the defendant act knowingly with respect to the elements of the offense.<sup>9</sup> This revision improves the clarity, completeness, and consistency of the revised statute.

Second, the revised bigamy statute merges with the revised false statements offense. Both the current D.C. Code false statements offense<sup>10</sup> and the revised false statements offense<sup>11</sup> criminalize making material false statements in writing to the District of Columbia government, but only when the document specifically notes that a false statement is subject to a criminal penalty. The current D.C. Code bigamy statute contains different elements—a person must “marr[y] or enter[] a domestic partnership” while already having a spouse or domestic partner, with no specific reference to a misrepresentation.<sup>12</sup> Both the current D.C. Code bigamy and false statements statutes clearly cover, in different ways, providing false statements about a previous marriage or domestic partnership on a District of Columbia marriage license application or domestic partnership declaration. Despite this overlap, there is no statutory provision or legislative history indicating whether a person is subject to prosecution for both offenses for the same conduct. While the current D.C. Code does not include a general merger provision, the DCCA has held that offenses merge if the elements of one offense are necessarily included in the elements of the other offense.<sup>13</sup> In contrast, the revised statute codifies a merger provision that allows charging of both the RCCA bigamy and false statements offenses for the same conduct, but prevents multiple convictions and sentences for such conduct. The merger procedure in bigamy follows the general merger provisions in RCCA § 22A-212. This change reduces unnecessary overlap and improves the overall consistency and proportionality of the revised statutes.

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<sup>6</sup> *Alexander v. United States*, 136 F.2d 783, 784 (D.C. Cir. 1943) (“The great weight of authority sustains the Government's position, though there is respectable authority that an honest and reasonable belief that the first marriage has been terminated is a defense. So far as we know, the question is new in the District of Columbia. In the light of the undisputed facts of this case it is not necessary that we answer it. The rule which denies the defense of good faith is a harsh one and in a proper case where the information is such that a reasonable person, after an honest and thorough investigation, would have been justified in remarrying in reliance on it, we should be slow to hold that such a remarriage constituted a felony.” (internal citations omitted)).

<sup>7</sup> For further discussion of what types of mistakes negate which culpable mental states, see commentary to RCCA § 22A-208.

<sup>8</sup> *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

<sup>9</sup> *See, e.g.*, RCCA § 22A-3202.

<sup>10</sup> D.C. Code § 22-2405.

<sup>11</sup> RCCA § 22A-4207.

<sup>12</sup> D.C. Code § 22-501.

<sup>13</sup> *Byrd v. United States*, 598 A.2d 386, 389 (D.C. 1991). Notably, however, the DCCA has not always strictly applied the “elements test” in *Byrd* to require that all elements of one offense be necessarily included in the elements of another. For further discussion, *see* Commentary on RCCA § 22A-212, Merger of Related Offenses.

*The revised bigamy statute may substantively change current District law in two main ways.*

First, the revised bigamy statute codifies an affirmative defense where the actor reasonably believes that the spouse or domestic partner is deceased. No comparable defense exists in the current D.C. Code. However, District case law from the 1940s indicates that, while an unsettled question in the District, a reasonable mistake by the defendant as to their marital status may constitute a defense.<sup>14</sup> To resolve this ambiguity, the revised statute provides this affirmative defense in recognition that there are situations in which a person does not meet the time or other requirements in the exception to liability, but still could hold a reasonable belief that their spouse or domestic partner is deceased. As an affirmative defense, the defendant has a significant burden of production to show that their belief is reasonable. This revision improves the proportionality of the revised statutes.

Second, the revised statute does not criminalize a person who is still married (whether the marriage is a “common law” or officially licensed) when they purport to form a second marriage that is a “common law” marriage. The current D.C. Code refers to a marriage as a “legally recognized union of 2 persons,”<sup>15</sup> but makes no statutory reference to criteria for such a “legally recognized union” that occurs in the District of Columbia other than the official licensure process in Title 46 Chapter 4. Nonetheless, District case law continues to recognize “common law” marriages when there is proof of cohabitation and an expressed mutual agreement to be married.<sup>16</sup> The sparse District case law does not appear to address the question of whether or to what extent a second, common law marriage conducted before the dissolution of the first marriage constitutes bigamy under D.C. Code § 22–501. Resolving this ambiguity, the revised statute does not provide criminal bigamy liability for a second common law marriage entered into in the District while a person is still married (whether per a licensed or common law marriage). Given the unclear and relatively low threshold for a person to form a “common law” marriage in the District, a person may enter into a common law marriage without awareness that they are officially married.<sup>17</sup> Criminalization of such behavior is inappropriate and may raise constitutional concerns about vagueness. Moreover, any such a second “common law” marriage would be void ab initio as a

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<sup>14</sup> *Alexander v. United States*, 136 F.2d 783, 784 (D.C. Cir. 1943) (“The great weight of authority sustains the Government's position, though there is respectable authority that an honest and reasonable belief that the first marriage has been terminated is a defense. So far as we know, the question is new in the District of Columbia. In the light of the undisputed facts of this case it is not necessary that we answer it. The rule which denies the defense of good faith is a harsh one and in a proper case where the information is such that a reasonable person, after an honest and thorough investigation, would have been justified in remarrying in reliance on it, we should be slow to hold that such a remarriage constituted a felony.”) (internal citations omitted).

<sup>15</sup> D.C. Code § 46–401(a) (“Marriage is the legally recognized union of 2 persons. Any person may enter into a marriage in the District of Columbia with another person, regardless of gender, unless the marriage is expressly prohibited by D.C. Code § 46-401.01 or § 46-403.”).

<sup>16</sup> See e.g., *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). The District is one of fewer than a dozen jurisdictions nationally that continue to recognize new common law marriages. See, e.g. National Conference of State Legislatures, *Common Law Marriage by State* (March 11, 2020) (listing 8 states that currently recognize the formation of a common law marriage in some circumstances, and an additional 6 states that recognized some form of common law marriage up until a date of abolition sometime in the last 70 years).

<sup>17</sup> The applicability of common law marriage precedents to commitment ceremonies that occurred in the LGBTQ community prior to marriage equality is of particular concern as some individuals may have become married under a common law definition without knowing it. See Eva N. Juncker and Emily Neuhausen, *Oops! Are you accidentally married?* Washington Blade (April 1, 2016).

civil matter,<sup>18</sup> and a knowing misrepresentation by a person in the second common law marriage may be subject to civil or criminal penalties.<sup>19</sup> This change clarifies and may improve the proportionality of the revised statutes.

*Other changes to the revised statute are clarificatory in nature and are not intended to substantively change current District law.*

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<sup>18</sup> D.C. Code §46-401.01(3) states that any marriage is void ab initio when it is the “marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.”

<sup>19</sup> *E.g.*, under the revised false statements offense.

**Appendix A – Black Letter Text of Draft Revised Statutes.**

**§ 22A-5602. Bigamy.**

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
  - (1) Marriage license application; or
  - (2) Domestic partnership declaration.
- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more immediately prior to the application or declaration, both:
  - (1) Has had no contact with the spouse or domestic partner; and
  - (2) Is not aware that the spouse or domestic partner is living.
- (c) *Affirmative defense.* It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the spouse or domestic partner is deceased.
- (d) *Penalties.* Bigamy is a Class A misdemeanor.
- (e) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for false statements under § 22A-4207 shall merge when the convictions arise from the same act or course of conduct and the same complainant.
- (f) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-212.

**Appendix B – Redlined Text**  
**Comparing Draft Revised Statute with Current D.C. Code Statute.**

**§ 22A-5602. Bigamy.**

- (a) *Offense.* An actor commits bigamy when the actor knowingly misrepresents the existence or status of a previous marriage or domestic partnership on a District of Columbia:
  - (1) Marriage license application; or
  - (2) Domestic partnership declaration.
- (b) *Exclusion from liability.* It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more immediately prior to the application or declaration, both:
  - (1) Has had no contact with the spouse or domestic partner; and
  - (2) Is not aware that the spouse or domestic partner is living.
- (c) *Affirmative defense.* It is an affirmative defense to liability under this section that, in fact, the actor reasonably believes that the spouse or domestic partner is deceased.
- (d) *Penalties.* Bigamy is a Class A misdemeanor.
- (e) *Multiple convictions for related offenses.* A conviction for an offense under this section and a conviction for false statements under § 22A-4207 shall merge when the convictions arise from the same act or course of conduct and the same complainant.
- (f) *Merger procedure and rule of priority.* For an actor found guilty of 2 or more offenses that merge under this section the sentencing court shall follow the procedures specified in subsections (b) and (c) of § 22A-212.

~~(a) Whoever, having a spouse or domestic partner living, marries or enters a domestic partnership with another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years; provided, that this section shall not apply to any person whose:~~

~~(1) Spouse or domestic partner has been continually absent for 5 successive years next before such marriage or domestic partnership without being known to such person to be living within that time;~~

~~(2) Marriage to said living spouse shall have been dissolved by a valid decree of a competent court, or shall have been pronounced void by a valid decree of a competent court on the ground of the nullity of the marriage contract; or~~

~~(3) Domestic partnership with said living domestic partner has been terminated in accordance with § 32-702(d), or § 16-904(e).~~

~~(a-1) In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.~~

~~(b) For the purposes of this section, the term:~~

~~(1) “Domestic partner” shall have the same meaning as provided in § 32-701(3).~~

~~(2) “Domestic partnership” shall have the same meaning as provided in § 32-701(4).~~

## Appendix. C – Disposition of Comments on Report #73 – Bigamy (First Draft)

OAG written comments received November 16, 2021:

1. OAG, on pg. 1, recommends renaming the offense from “bigamy.” No alternative is suggested. OAG states that the name is not accurate because the “statute would not prohibit a person from marrying someone when they are already married to someone else - which is what bigamy is.”
  - The CCRC does not adopt the recommendation because the term “bigamy” is widely known and the act of knowingly misrepresenting one’s marriage status when applying for a marriage license is functionally equivalent in nearly all cases (leaving out only rare situations where a second “common law” marriage is at issue).
2. OAG, on pg. 2, recommends expanding the scope of the offense to “contain a provision that specifically states that a purported common law marriage involving at least one married person is invalid.” OAG notes that the District has long recognized common law marriages in law and says that, “while this provision would continue to make it an offense for someone who was already married to misrepresent their marriage status on a marriage license application, *see* paragraph (a)(1), it would not be an offense for a person who was already married to enter into a common law marriage.”
  - The CCRC does not adopt the OAG recommendation to provide criminal liability for a person who, being married, enters into a common law marriage. However, the CCRC has updated the commentary to note this possible change in law. The revised commentary states, in relevant part:
    - Second, the revised statute does not criminalize a person who is still married (whether the marriage is a “common law” or officially licensed) when they purport to form a second marriage that is a “common law” marriage. The current D.C. Code refers to a marriage as a “legally recognized union of 2 persons,”<sup>20</sup> but makes no statutory reference to criteria for such a “legally recognized union” that occurs in the District of Columbia other than the official licensure process in Title 46 Chapter 4. Nonetheless, District case law continues to recognize “common law” marriages when there is proof of cohabitation and an expressed mutual agreement to be married.<sup>21</sup> The sparse District case law does not appear to address the question of whether or to what extent a second, common law marriage conducted before the dissolution of the first marriage constitutes bigamy under D.C. Code § 22–501. Resolving this ambiguity, the revised statute does not provide criminal bigamy liability for a second common law marriage entered into in the District while a person is still married (whether per a licensed or common law marriage). Given the unclear and relatively low threshold for a person

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<sup>20</sup> D.C. Code § 46–401(a) (“Marriage is the legally recognized union of 2 persons. Any person may enter into a marriage in the District of Columbia with another person, regardless of gender, unless the marriage is expressly prohibited by D.C. Code § 46-401.01 or § 46-403.”).

<sup>21</sup> *See e.g., Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). The District is one of fewer than a dozen jurisdictions nationally that continue to recognize new common law marriages. *See, e.g.* National Conference of State Legislatures, *Common Law Marriage by State* (March 11, 2020) (listing 8 states that currently recognize the formation of a common law marriage in some circumstances, and an additional 6 states that recognized some form of common law marriage up until a date of abolition sometime in the last 70 years).

to form a “common law” marriage in the District, a person may enter into a common law marriage without awareness that they are officially married.<sup>22</sup> Criminalization of such behavior is inappropriate and may raise constitutional concerns about vagueness. Moreover, any such a second “common law” marriage would be void ab initio as a civil matter,<sup>23</sup> and any knowing misrepresentation by a person in the second common law marriage may be subject to civil or criminal penalties.<sup>24</sup> This change clarifies and may improve the proportionality of the revised statutes.

3. OAG, on pg. 2, says that paragraph (b) of the statute is unclear as to whether the reference to 5 years at the beginning of the paragraph applies to both subparagraphs (1) and (2).
  - The CCRC adopts the recommendation to clarify the statute by deleting a comma and adding the word “both” so the paragraph states: “It is an exclusion to liability under this section that the actor, in fact, for 5 successive years or more immediately prior to the application or declaration, both: (1) Has had no contact with the spouse or domestic partner; and (2) Is not aware that the spouse or domestic partner is living.” This change clarifies that the 5 year time limitation applies to both subparagraphs (1) and (2).
4. OAG, on pgs. 2-3, recommends changing the commentary explanatory note’s description of paragraph (b) so that it uses a word other than “requirement” to refer to the 5-year limitation. OAG says, “, the “for 5 years” phrase in the lead-in language to (b) isn't a “requirement”; it is a phrase that modifies the actual 2 requirements that follow (i.e., no contact and no awareness).”
  - The CCRC adopts the recommendation to clarify the commentary so that it states: “Per the rules of interpretation in RCC § 22A-207, “in fact” applies to all circumstances that must be proven the exclusion from liability, namely that for 5 or more years immediately prior to the application or declaration the actor: (1) had no contact with the spouse or domestic partner, and (2) is not aware that the spouse or domestic partner is living.”
5. OAG, on pg. 3, says that the text and commentary need to be clarified as to who has the burden of proof as to the exclusion of liability in paragraph (b).
  - The CCRC partially adopts the recommendation by clarifying the burden of proof in the commentary entry to state: “RCCA § 22A-201 specifies the burden of proof and production for all affirmative defenses in the RCC. Under RCCA § 22A-201, if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of at least one element of the exclusion from liability beyond a reasonable doubt.” No statutory clarification or change is needed as the burden of proof is described in RCCA § 22A-201.

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<sup>22</sup> The applicability of common law marriage precedents to commitment ceremonies that occurred in the LGBTQ community prior to marriage equality is of particular concern as some individuals may have become married under a common law definition without knowing it. See Eva N. Juncker and Emily Neuhausen, *Oops! Are you accidentally married?* Washington Blade (April 1, 2016).

<sup>23</sup> D.C. Code §46-401.01(3) states that any marriage is void ab initio when it is the “marriage of any persons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.”

<sup>24</sup> E.g., under the false statements offense.

In addition to changes in response to received comments, the CCRC recommends the following additional changes based on its internal review:

1. The CCRC has updated citations in the statutory language (and corresponding commentary entries) to refer to the Revised Criminal Code Act of 2021 (the legislation submitted by the CCRC on October 1, 2021) rather than the Revised Criminal Code (that was issued by the CCRC March 31, 2021).
2. The CCRC has deleted cross-references in statutory language (and corresponding commentary entries) to definitions that are generally defined in Subtitle 1 of Title 22A.